

D.T.E. 01-20

September 24, 2002

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts.

ORDER GRANTING VERIZON AND AT&T MOTIONS FOR RECONSIDERATION,
IN PART, AND REQUESTING ADDITIONAL EVIDENCE

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ORDER GRANTING VERIZON AND AT&T MOTIONS FOR RECONSIDERATION,
IN PART, AND REQUESTING ADDITIONAL EVIDENCE

I. INTRODUCTION

On July 11, 2002, after a comprehensive 18-month investigation, the Department of Telecommunications and Energy (“Department”) issued an order in D.T.E. 01-20 Part A (“Order”), establishing new rates for unbundled network elements (“UNEs”) and interconnection offered by Verizon New England, Inc. d/b/a Verizon Massachusetts (“Verizon”) to competitive local exchange carriers (“CLECs”).

On August 14, 2002, Verizon filed a Motion for Reconsideration and Clarification (“Verizon Motion”) of the Order. The following CLEC parties also filed motions: AT&T Communications of New England, Inc. (“AT&T”); Allegiance Telecom of Massachusetts, Inc. and Conversent Communications of Massachusetts, LCC (collectively, “CLEC Coalition”); WorldCom Inc. (“WorldCom”) and Z-Tel Communications, Inc. The same parties filed comments (“Comments”) on the motions on August 29, 2002. Verizon, AT&T, WorldCom, Allegiance and Conversent filed reply comments (“Reply Comments”) on September 6, 2002.

This order addresses, specifically,¹ Verizon’s motions for reconsideration with regard to right to use (“RTU”) fees and the ratio of new switches to existing switches (Verizon Motion at 12-14, 25-30), as well as AT&T’s request in its Motion for Partial Reconsideration and

¹ The Department addresses these motions in part, with the intention of rendering a separate decision on the remaining issues raised in the parties’ motions for reconsideration and clarification.

Clarification (“AT&T Motion”) that the Department reconsider its findings on new switch discounts (AT&T Motion at 17-22).

In addition, we address Verizon’s request that the Department reconsider its ruling on the DC power distribution rate element because, Verizon now indicates, it inadvertently misstated on the record the average length of its DC power cables for collocation, and the Department ignored other evidence of record and relied on the incorrect statement (Verizon Motion at 34-35).

In this order, the Department grants the parties’ motions for reconsideration of these limited issues, as discussed below: RTU fees; the ratio of new to existing switches; the switch discount; and DC power distribution cable length. However, because we find the record to be incomplete on these matters, in order to make a substantive determination on reconsideration, the Department will permit additional evidence including further testimony on evidence already of record, to be submitted as pre-filed testimony and supporting documentation and to be examined in an evidentiary hearing. The request for additional evidence is limited to the issues specified.

II. STANDARD OF REVIEW

The Department’s policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995);

Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence.

Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

III. ISSUES

A. Switching

1. RTU Fees

In its motion requesting that the Department include additional RTU fees in the TELRIC study, Verizon relies on cost estimates from the Department's previous UNE rates proceeding,

the 1996 Consolidated Arbitrations² (Verizon Motion at 13). Verizon indicates that if the investment for 90 percent of its switches is to be based upon “new” switch prices, there will be an additional cost of \$225,682,012 for RTU fees, which, according to Verizon, the Department inadvertently ignored, without explanation (id. at 12-13, citing D.P.U. 96-73/74,96-75,96-80/81,96-83,96-94 at Part B, Workpaper at 92).

The Department stated that:

Verizon indicates that it “did not attempt to estimate the cost of the initial switch software packages,” but instead relies on cost estimates from other proceedings (Exh. VZ-38, at 77). Verizon has failed to substantiate its assertion that the assumption of 90 percent new switches requires any increase in RTU costs, and therefore its compliance filing shall not include any additional RTU costs.

Order at 308.

The Department rejected Verizon’s cost data from the Consolidated Arbitrations as outdated. However, we inadvertently neglected to direct Verizon to submit more recent cost information, or, as an initial matter, to assess whether this new category of RTU fees is appropriate. Accordingly, we first direct parties to address the merits of the category of RTU costs as a general matter. Further, so that we can rely on more recent data, we direct Verizon to provide updated cost information for examination by the Department and the parties. This information shall include testimony and comprehensive supporting documentation regarding estimates of the cost of RTU fees associated with initial switches, based on Verizon’s recent purchases of software packages associated with Nortel and Lucent switches (i.e., from 2000 and 2001).

² Consolidated Arbitrations, D.P.U. 96-73/74,96-75,96-80/81,96-83,96-94.

Verizon also indicates that its estimated cost of \$1,880,663 per switch is “in addition to” the RTU costs set forth in Exh. VZ-37, Part G-9, at 1-3 (Verizon Motion at 13-14) (emphasis in original). In its testimony and supporting documentation, Verizon shall explain why it proposes to supplement the entirety of the RTU fees that are included in Part G-9, at 1-3; i.e., why the RTU fees that Verizon contends are necessary for new switches would not be in lieu of that portion of the RTU costs in its original cost study that corresponds to existing switches.

2. Ratio of “New” Switches to “Existing” Switches

In determining the appropriate split between new equipment and growth equipment for the switching cost study, the Department examined Verizon’s response to RR-DTE-66, in which Verizon prepared a “life-cycle” analysis, and AT&T’s response to RR-DTE-56, which is based on an assumption that in the first year, all new switches are deployed and in subsequent years, growth equipment is added. Order at 301-303. The Department stated:

By contrast, the analysis presented in RR-DTE-56 is based on a more appropriate foundation for a TELRIC analysis; namely, the assumption that in the first year, the model deploys all new switches and then, in subsequent years, growth is added to accommodate forecast demand. This assumption is more appropriate because it describes the “dropped in place” nature of a TELRIC-modeled network.

Id. at 301-302.

Verizon makes several arguments in support of its motion for reconsideration of the Department’s directive regarding the split between Verizon’s “new” and “growth” switching investment. Verizon contends that:

(1) the Department

has mistakenly concluded that a ‘dropped in place’ network (i.e., instantaneous replacement of the entire network) requires the Department to assume that all of Verizon MA’s switches could be purchased at the ‘new’ switch discount level that may have been available for a minimal amount of new switches that have been installed recently (Verizon Motion at 25) (emphasis in original);

(2) the Department inadvertently neglected to realize that Verizon has already fully deployed digital switches and will never replace them (id. at 26);

(3) the Department’s decision represents a “dramatic departure” from its decision in the Consolidated Arbitrations Phase 4 (id.); and

(4) the Department “mistakenly concluded that the 90 percent new/10 percent growth equipment split proposed by AT&T is superior to the ‘life-cycle’ discount analysis presented by Verizon MA in response to a staff record request” (id. at 28).

Verizon also contends that “if the Department did not believe that it had sufficient information to evaluate the actual life-cycle analysis presented by Verizon, it should have directed Verizon, as it did elsewhere in the Order, to submit supplemental information and analysis” (id. at 29) (footnote omitted).

In summary, Verizon asks the Department to reconsider its decision and to adopt the actual discount levels that Verizon has realized for past purchases, or, in the alternative, to “either adopt the life-cycle analysis presented by Verizon MA or require Verizon MA to submit a more detailed life-cycle analysis, in order to properly capture the forward-looking costs” (id. at 30).

AT&T contends that Verizon is reiterating testimony and arguments that the Department already considered and rejected (AT&T Comments at 2). Responding to Verizon's argument that the instantaneous replacement of switches would increase vendors' price, AT&T replies that the Department already addressed and rejected this argument, and, moreover, that "the Department found that 'if Verizon were to order several hundred new switches simultaneously, the cost per switch could result in lower per-switch prices' than the 90/10 new/growth melding ordered by the Department" (*id.*, citing Order at 307).

AT&T further argues that, contrary to Verizon's assertion, the Department's finding relies on the evidence and is consistent with the testimony of Verizon's switching witness (*id.* at 3). Finally, AT&T opposes Verizon's alternative request that it be allowed to submit supplemental information regarding its life-cycle analysis, characterizing it as a "second bite at this apple" that is inappropriate because Verizon had the burden of proof (*id.* at 3-4).

We find that reconsideration is appropriate in this instance because the record on which our Order was based does not adequately explore supplemental record information about a critical aspect of Verizon's switching cost study. Having rejected Verizon's reliance on one year's worth of data as the basis for determining a forward-looking switch discount, the Department relied on record request responses which, because they were submitted, in one instance the day before the last day of hearings, and in the other instance, after the close of hearings on February 7, 2002, were not subject to cross-examination and further investigation.³

³ The Department issued RR-DTE-56 on January 29, 2002 and AT&T submitted its response on February 6, 2002. The Department issued RR-DTE-66 on January 31, (continued...)

The point here is to come as near as we can to the right answer – the answer most correct under TELRIC – and not to shrink from a second look at the record, where, as here, one is warranted by the importance of the issue. In light of the importance of these record requests to the Department’s findings, reconsideration is appropriate.

Accordingly, parties are directed to supplement and justify the analyses that they submitted in response to Department Record Requests 56 and 66 with the specific and limited purpose of quantifying the split between new and growth equipment that is appropriate in a TELRIC model.⁴ We request that parties provide a range of analyses based on varying the critical assumptions (i.e., both increasing and decreasing such variables), such as the time span encompassed by the analysis, and to justify their proposals regarding such assumptions (e.g., Verizon’s use of five years in its life-cycle analysis, and AT&T’s use of 15 years in its analysis).

³(...continued)

2002 and Verizon submitted its response on February 13, 2002.

⁴ The Department recognizes that Verizon’s position is that “one year’s worth of data is reflective of forward-looking purchases” (Verizon Motion at 29). The purpose of allowing parties to augment the analyses submitted in response to record requests is to enable the Department to address the motions for reconsideration, and, to make a more informed decision about the appropriate method for determining the split between new and growth equipment. Therefore, constructive suggestions for improvement, if and as necessary, to the responses to Department Record Requests 56 and 66 are sought.

3. Switch Discount

In its motion for reconsideration, AT&T asserts that:

[g]iven the Department's proper finding that the price in the Nortel contract is much higher than Verizon actually pays for new switches, and Verizon's concession regarding the correct price for new switches, it was a mistake for the Department not to adopt this per line price and the associated price discount (AT&T Motion at 20).

AT&T contends that the Department "inadvertently misread the statement in Verizon's reply brief regarding the meaning of its record request responses with data on new switch purchases" (id. at 17). AT&T computes a proposed switch discount that is based on the cost data Verizon provided in its Reply Brief, as well as on the discount and per-line material prices in Verizon's proposed cost study (id. at 20). AT&T asserts that, contrary to the Department's conclusion that Verizon did not offer a figure for new switch materials purchased by Verizon from Nortel through competitive bid, Verizon in fact conceded in its reply brief that Verizon's own record request responses demonstrates the specific, and much lower, price that Verizon actually pays on a per line basis for new, uninstalled switches" (id.). According to AT&T, the Department mistakenly read Verizon's Reply Brief as arguing that the Nortel bid price would be much higher than the per-line price Verizon included in its Reply Brief, when the actual reason for the higher price involves the loading factors, rather than the switch discount itself (id. at 21). AT&T also contends that Verizon should reduce the Lucent new switch discount because "it would make no sense to assume that going forward Lucent could get away with selling switches for much higher prices" (id.).

In response to AT&T's motion, Verizon contends that AT&T misrepresents the basis for the Department's decision and Verizon's argument in its Reply Brief. According to Verizon, the Department rejected the discount in RR-DTE-49-S for two independent reasons: first, because "the Department was 'persuaded by Verizon that it would be inappropriate to rely on the information provided in RR-DTE-49-S because the discount that AT&T recommends is not the effective overall discount achieved in the bid'"; and second, because "the Department was persuaded by Verizon MA's explanation that the 'bid result cannot be used as the basis for a forward-looking valuation of Verizon entire local switching investment' (Verizon Reply Brief at 68)" (Verizon Comments at 14, citing Order at 307).

According to Verizon, AT&T ignores the Department's second reason, and, furthermore, Verizon states, the notion that a high discount could be used as a basis for new switch discounts in the forward-looking environment is not compatible with forward-looking valuation" (id. at 15). Verizon contends that the figure of \$36 per line that it references in its Reply Brief does not "in any way reflect the specific idiosyncrasies of the Nortel bid that combined in this case to produce such an egregious discount" (id. at 16).⁵ Verizon also opposes AT&T's request that the Department modify the Lucent switch discount, based on the Nortel discount data provided in response to RR-DTE-49-S because, among other reasons, the

⁵ In its Reply Brief, Verizon refers to the \$36 per line for the first time, and in so doing, identifies it as proprietary data. In its comments in response to AT&T's motion, Verizon refers to the \$36 cost without designating it as proprietary, and therefore, we refer to this data explicitly in this order. It corresponds to the "much higher" figure referenced by Verizon in its Reply Brief.

“Department has already consented to and approved the use of more than one vendor in the efficient, forward-looking network” (id. at 17, citing Order at 304).

The Department stated:

We will first address the relevance of the Nortel competitive bidding process. We are persuaded by Verizon that it would be inappropriate to rely on the information provided in RR-DTE-49-S because the discount that AT&T recommends is not the effective overall discount achieved in the bid. We note that although Verizon faults the price that AT&T infers from RR-DTE-49-S, Verizon does not offer a revised figure but simply states that with appropriate adjustments, the Nortel bid price would be “much higher” than a proprietary figure indicated in its brief, but does not indicate what this higher figure would be (Verizon Reply Brief at 67). Verizon explains that “the bid result cannot be used as the basis for a forward-looking valuation of Verizon MA’s entire local switching investment” (id. at 68). We are persuaded by Verizon’s argument. Although the evidence suggests that the competitive bidding process might yield a lower price than the contract price that Verizon incorporates in its TELRIC filing, there is not a sufficient record to support this conclusion (Tr. 11, at 2061-2062; RR-DTE-49-S). Therefore, the Department approves the discount that Verizon proposed for Nortel-supplied new and growth switching equipment (Exh. VZ-37, Part CP, Part CP-1, Part CP-3).

Order at 306-307.

Because Verizon submitted evidence regarding switch discounts after the close of hearings, the Department may have inadvertently misinterpreted late-filed cost data because it was not subject to full cross-examination (see RR-DTE-49-S, Verizon-VA’s Response to the FCC’s RR VZ-VA-32).⁶ Vetting the response to RR-DTE-49-S will put the Department’s resolution of this issue (whether that be reaffirmation of the Order’s outcome or a modified decision) on firmer footing. Accordingly, reconsideration is appropriate.

⁶ The Department issued RR-DTE-49-S on January 31, 2002 and Verizon submitted its response on February 12, 2002.

Parties have offered differing interpretations of the information on Nortel bids that Verizon provided in response to RR-DTE-49-S (see AT&T Motion at 17-22; Verizon Comments at 13-17; AT&T Reply Comments at 11-13). Parties are hereby directed to address this issue in more detail, and in so doing, to address specifically the relevance of the discount data incorporated in RR-DTE-49-S to the determination of the appropriate switch discount to assume in Verizon's TELRIC studies. Furthermore, Verizon shall supplement its response to this record request to include 2001 information.

B. DC Power Distribution

Verizon requests in its motion that the Department reconsider its ruling regarding DC power cable lengths for collocation, because the Department relied on incorrect information Verizon provided in its testimony that its survey of cable lengths for collocation jobs performed in 2000 showed an average cable length of 60.5 feet (Verizon Motion at 34). Verizon now states that the "actual" average cable lengths produced by the study are 121 feet, and, because the Department relied on the survey in adopting Verizon's proposed cable lengths, it should approve the corrected proposed average cable length (id. at 34-35).

The CLECs oppose any opportunity for Verizon to correct the record on reconsideration. As they note, the parties and the Department properly relied on Verizon's own sworn testimony, and because Verizon failed to correct the mistake before the record closed, parties did not have ample opportunity to challenge the 121-foot figure that Verizon is now advancing as the correct cable length (AT&T Comments at 21; WorldCom Comments at 18; CLEC Coalition Comments at 8).

The Department noted in the Order that Verizon originally provided data showing that 121 feet was the average one-way distribution cable length, but that Verizon's supplemental and hearing testimony indicated that 121 feet was the total cable length, and thus the Department found that the evidence supported halving the figure to produce a one-way average cable length of 60.5 feet. Order at 425-426. We find that, because the Department's treatment of the issue of the appropriate cable length is affected by Verizon's perhaps incorrect statements on the record and failed to address other contradictory evidence of record, reconsideration is appropriate. However, in order to make a determination regarding the appropriate cable length, the Department and other parties must have the opportunity to examine the support for Verizon's original 121-foot proposal. Accordingly, the Department will allow further investigation of Verizon's proposed power distribution cable length at the evidentiary hearing set in this order.

IV. CONCLUSION

The Department hereby grants the motions of Verizon and AT&T for reconsideration with regard to the issues of RTU fees, the ratio of new to existing switches, the switch discount, and DC power distribution cable length. We find, as a threshold matter, that the parties have met the Department's standard for reconsideration of these issues, as discussed above. However, we also find the existing record may be insufficient to render a determination on the substantive merits of the parties' motions. Accordingly, to ensure that an accurate and complete record has been developed on which to base an informed decision on the issues discussed herein, the Department will accept additional evidence and testimony on evidence

already of record. We hereby set an expedited schedule that seeks to balance the goal of obtaining the additional evidence needed with our goal of completing this proceeding in a timely manner, without unduly delaying the compliance phase.⁷ The filings indicated below are due, in both electronic and hard copy, at the Department and must be served on all parties at 5 p.m. on the dates specified.

Wednesday, October 2, 2002:	Pre-filed Direct Testimony and supporting documentation.
Friday, October 4, 2002:	Discovery requests.
Wednesday, October 9, 2002:	Discovery responses.
Friday, October 11, 2002:	Pre-filed Rebuttal Testimony.
Monday, October 21 and Tuesday October 22, 2002:	Evidentiary Hearings.
Tuesday, October 29, 2002:	Initial Briefs.
Monday, November 4, 2002:	Reply Briefs.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the motions of Verizon Massachusetts for reconsideration with regard to RTU fees, the ratio of new to existing switches, the switch discount, and DC power distribution cable length and the motion of AT&T of New England, Inc. for reconsideration of

⁷ The Department intends to render its decision on the other issues raised in the parties' motions for reconsideration and clarification before the completion of this additional evidentiary phase, thus enabling Verizon to begin work on the majority of its compliance filing.

the switch discount are granted insofar as the Department shall reconsider whether to change the substantive determinations in its Order based on further evidence to be submitted as directed above; and it is

FURTHER ORDERED: That this investigation proceed according to the schedule set forth above.

By Order of the Department,

_____/s/_____
Paul B. Vasington, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner